92-913

Supreme Court, U.S.
FILED
NOV 27 1992
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JEROME L. DOFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TROPE AND TROPE
THOMAS PAINE DUNLAP
12121 Wilshire Boulevard
Los Angeles, California 90025
(213) 879-2726
(310) 207-8228

Counsel of Record for
Petitioner JEROME L. DOFF

82 pp

QUESTIONS PRESENTED

1) Has the Ninth Circuit departed from the plain meaning of Rule 4(j), Federal Rules of Civil Procedure, and does Rule 4(j), which states that if service of process is not made within 120 days after the filing of the complaint, and the plaintiff "cannot show good cause why service was not made within that period, the action shall be dismissed" mandatory, or does it allow the Government to justify a four-year delay between filing and service by offering evidence of attempts to effect service after the 120-day period had expired?

2) Does the prohibition of 26 U.S.C. §7421, which prohibits suit for the purpose of restraining the collec-

tion of tax, permit the Government to take advantage of rights created by an order of a bankruptcy court but ignore conditions of that same order imposed upon creditors who elect to utilize its provisions?

3) Is it contrary to the accepted and usual course of judicial proceedings for a U.S. District Court to enter summary judgment against a taxpayer on the grounds that it is the duty of the taxpayer to present a copy of a written settlement Agreement between the taxpayer and the Government, and to refuse to consider parol evidence pursuant to Federal Rules of Evidence, Rule 1004, as to the content of said written Agreement, even though it is undisputed that (a) such an Agreement existed, (b) that a Tax Decision was rendered pursuant

thereto, and (c) that the original thereof had been in the possession of the Government and filed with the Tax Court; and was it an abuse of discretion for the Court of Appeals to sustain said decision?

4) Does the 14 year delay in this case since entry of stipulated tax court order which was intended to resolve all issues, during which delay interest claimed by the government contained to accrue (including 2 years of consideration by the Ninth Circuit), constitute an excessive fine or cruel and unusual punishment in contravention of the Eighth Amendment to the Constitution?

LIST OF PARTIES

All parties appear in the caption of this case. The parties to the proceeding below were the Petitioner Jerome L. Doff (Defendant below), and the Respondent United States of America (Plaintiff below).

TABLE OF CONTENTS

SECTION/DESCRIPTION	PAGE
QUESTIONS PRESENTED . . .	i
LIST OF PARTIES	iv
TABLE OF CONTENTS . . .	v
TABLE OF AUTHORITIES .	viii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	3
STATUTES AND RULES INVOLVED .	4
A. 26 U.S.C. §7421(a)	4
B. Rule 1004, Federal Rules of Evidence	5
C. Rule 4(j), Federal Rules of Civil Procedure	6
D. U.S. Constitution, Eighth Amendment	7
STATEMENT OF THE CASE . .	7
A. Preliminary Statement . . .	7
B. Facts Relating to Summary Judgment	9

C. Facts Relating to Government's Failure to Comply with Rule 4(j) and Election to be Bound by Bankruptcy Order 16

(1) The Bankruptcy Order 16

(2) F.R.C.P., Rule 4(j) 18

REASONS FOR GRANTING THE WRIT 20

A. Introduction 20

B. The U.S. District Court and the Court of Appeals Stepped Outside the Permissible Limits with Respect to Standards Applied to the Granting of the Summary Judgment Motion . . 23

C. When the Government Elects to Effect Service of Process Pursuant to an Agreement and Court Order, It Must be Bound by All of the Terms Thereof 30

D. Federal Rule of Civil Procedure 4(j) is Mandatory and Cannot be Cured by Later Efforts 36

E. The Excessive Delay in this Case is Violative of the Concept of Fair Treatment and the Eighth Amendment 44

CONCLUSION 47

APPENDIX

A. MEMORANDUM DECISION OF COURT OF APPEALS [FILED 8/3/92] A-1

B. ORDER OF COURT OF APPEALS [FILED 10/14/92]. B-14

C. ORDER OF DISTRICT COURT DENYING DEFENDANT JEROME L. DOFF'S MOTION TO DISMISS [ENTERED 5/12/88]. . . C-16

D. SUMMARY JUDGMENT OF DISTRICT COURT [ENTERED 1/20/89] . . .D-20

TABLE OF AUTHORITIES

CASES **PAGE**

Excalibur Oil, Inc. vs. Gable
105 F.R.D. 543 (N.D. ILL. 1985) . . 43

Mitsui Manufacturer's Bank vs. Federal Ins. Co.
795 F.2d 827, 829 (9th Cir. 1986) . 24

Rule v. Nelson
106 F.R.D. 514, 517 (U.S.D.C. NEV. 1985) 38

Schiavone v. Fortune
477 U.S. 21, 91 L.Ed. 2d 18, 106 S.Ct. 2379 (1986) 37

Schuster v. Connolly 38
107 F.R. D. 755, 757 (W.D.P.A. 1985)

U.S. v. Kenner General Contractor, Inc.
764 F.2d 707 (9th Cir. 1985) . . . 39

United States v. Georgia-Pacific Company
421 F.2d 92, 96 (9th Cir. 1970 . . 33

United States Constitution
Eighth Amendment 7, 44

STATUTES

26 U.S.C. §6601 . . . . . 9, 25

26 U.S.C. §6651 . . . . . 9, 12, 25

26 U.S.C. §6653 . . . . . 9, 12, 25

26 U.S.C. §7122(b) 11, 12

26 U.S.C. §7402 . . . . . 3, 10

26 U.S.C. §7421(a) 4, 17, 32

28 U.S.C. §1254(i) 4

28 U.S.C. §§1340 and 1345 . . 3, 10

Federal Rules of Civil Procedure

Rule 4(d). 30

Rule 4(j) 3, 6, 9, 16, 18
19, 20, 36, 37
38, 39, 42, 43

Rule 6(b) 39, 42

Federal Rules of Evidence

Rule 1004 . . . . . 5, 15, 26

Other
Revenue Procedure 60-17, §2.01 . 12

IN THE SUPREME COURT
OF THE UNITED STATES

JEROME L. DOFF,	)
	)
Petitioner,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent.	)
	)

PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, Jerome L. Doff, respectfully prays that a writ of certiorari issue to review the Judgment and Memorandum in the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on August 3, 1992, as modified by Order after Petition for Rehearing, entered October 14, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit in this case is not published. A copy of the Memorandum Decision filed August 3, 1992, is reprinted in Appendix "A" hereto, page A-1, infra. The first sentence thereof was modified by Order entered October 14, 1992, which Order also denied Petitioner's Petition for Rehearing. Said Order is reprinted in Appendix "B", page B-14, infra. The Order of the United States District Court, Central District of California, denying Petitioner's Motion to Dismiss entered May 12, 1988, is reprinted as Appendix "C", page C-16, infra, and the Summary Judgment of the United States District Court entered January 20, 1989, is reprinted as Appendix "D", page D-20,

infra.

JURISDICTION

Invoking federal jurisdiction under 26 U.S.C. §7402 and 28 U.S.C. §§1340 and 1345, the Respondent Government brought this suit in the Central District of California on May 30, 1984. On May 12, 1988, the Central District denied Petitioner's motion to dismiss for failure to comply with Federal Rule of Civil Procedure 4(j). See page C-16, infra. On January 20, 1989, the Central District entered its summary judgment in favor of Respondent and against Petitioner.

Upon Petitioner's appeal, the Ninth Circuit entered its Memorandum Decision affirming the District Court on August 3, 1992. See page A-1, infra. A Petition for Rehearing was sought and on

October 14, 1992, the Ninth Circuit amended its Memorandum Decision, but denied the Petition for Rehearing. See page B-14, infra.

The jurisdiction of this Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

A. 26 U.S.C. §7421(a).

"Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

/ / /

/ / /

B. **Rule 1004, Federal Rules of Evidence.**

"The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if --

"(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless proponent lost or destroyed them in bad faith; or

"(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

"(3) Original in possession of proponent. At a time when an original was under the control of the party against whom offered, that party was put on notice by the pleadings or otherwise, that the contents would be a subject of

proof at the hearing, and that party does not produce the original at the hearing; or

"(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue."

C. **Rule 4(j), Federal Rules of Civil Procedure.**

"4(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not

apply to service in a foreign country pursuant to subdivision (i) of this rule."

D. U.S. Constitution, Eighth Amendment

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

STATEMENT OF THE CASE

A. Preliminary Statement.

This tax matter has been pending for over 30 years. In 1960 and 1961, Petitioner filed and paid his taxes. The Government disagreed with Petitioner, and in 1978, a written settlement Agreement and stipulated Tax Order was entered, specifying assessments of $109,199.82, which Petitioner paid, in full. Another six years went by, and

then in 1984, the Government commenced this action for interest, in an amount in excess of the liquidated sum contained in the stipulated tax Order. However, the Government did not effect service until another four years later, in 1988 -- even though it elected to utilize a method of service available to it two years earlier.

This early history is indicative of the lack of diligence of the Government in pursuing this matter, which becomes relevant to the facts set forth below relating to entry of summary judgment against Petitioner because he could not produce the written settlement Agreement entered into 10 years before he was served (even though the Government, which had filed the original with the Tax Court, could not do so either),

and to the Government's failure to act diligently in attempting to serve Petitioner within 120 days of issuance of the Summons as required by Rule 4(j), Federal Rules of Civil Procedure.

B. Facts Relating to Summary Judgment.

Petitioner paid all taxes he believed owing to the Respondent Government pursuant to a written Agreement entered into between him and the Respondent Government. The Government admits that the Tax Court order contained only assessments for tax deficiencies of $86,320.85 and statutory additions to tax pursuant to 26 USC §6651(a) and §6653(a) of $22,878.97. It did not contain any provision for interest pursuant to 26 USC §6601, upon which the Government based its present

claim for interest.

The only evidence as to the content of said written Agreement is that of Petitioner's attorney, who states that it excluded interest. Without offering any contrary evidence, the Government obtained a summary judgment for interest in an amount twice that of the settlement figure agreed upon and already paid by Petitioner.

This action was commenced in the United States District Court by Respondent United States of America ("Government") for the purpose of reducing to judgment federal tax assessments against Petitioner Jerome L. Doff and his former wife, now deceased. Jurisdiction in the U.S. District Court was based upon 28 U.S.C. §1340 and §1345 and 26 U.S.C. §7402. Petitioner Jerome

L. Doff filed his tax returns for 1960 and 1961. The Government contended that a long term gain should have been treated as a short term gain and assessed delinquencies. Negotiations took place between the Government attorneys and Petitioner's attorneys, as a result of which the parties entered into a written Agreement signed by attorneys for both Petitioner and the Respondent Government, and a stipulated Tax Court Order was entered February 9, 1978, which recited that the court had received a document "signed by counsel for Petitioner Jerome L. Doff and Respondent [Government] which the Clerk of the Court is directed to file as of the date received as a Stipulation between said Petitioner and Respondent."

26 U.S.C. §7122(b) provides that

when an agreement resolving a tax dispute is entered into, the Government shall file a statement showing the tax assessed, interest and other additions to tax. The Tax Court Decision in this case does show "additions to tax" assessed pursuant to 26 U.S.C. §6651(a) and §6653(a). However, the Tax Court Decision does not show any interest assessed, as would be required by §7122(b) if any interest had been agreed upon.

Revenue Procedures 60-17, §2.01, provides that the payment of interest can be excluded "by mutual agreement."

The Tax Court Decision provided for total principal and statutory additions of $109,199.82. Petitioner paid all of said sum.

Petitioner introduced evidence by

way of Declarations that his written Agreement provided only for payment of principal and statutory additions, with no interest except interest between date of execution and finality of the Tax Court Order.

Eight months after the Tax Court Order was issued, the Government sent a letter to Petitioner's attorney requesting payment of amounts which included interest. Petitioner's attorney responded by letters dated November 10, 1978, and December 11, 1978, pointing out that interest was not included in the settlement. The Government made no response whatsoever for six years until it filed its Complaint in 1984 seeking to assess approximately $100,000 in additional interest, which it contended was continuing to accrue, eventually

reaching a total of $216,411.37.

The Government moved for summary judgment. Although the Tax Court Order clearly stated that the original written Agreement had been received by the Clerk of the Court, the Government was unable to produce either the original or a copy. Petitioner was unable to produce a copy. However, Petitioner introduced uncontradicted evidence by way of Declarations as to the Agreement. The Government introduced no evidence on that topic.

Although the U.S. District Court admitted that the written agreement had existed (the Tax Court Decision so recited), it found that Petitioner had offered no evidence of any writing and that without production of the document itself, the court could not "assume" the

existence of such a document.

Petitioner contends that this holding was an abuse of discretion and contrary to Federal Rules of Evidence, which permits the introduction of secondary evidence of the contents of a writing if the original has been lost. The U.S. District Court admitted that a writing existed because of the reference thereto in the Tax Court Decision, but stated that "You've got to produce a writing. I'm sorry, but there has to be a writing."

In so doing, the court rendered meaningless Federal Rule of Evidence 1004 and denied Petitioner the right to present parol testimony at trial. The court appears to have added an unwritten amendment to the Rule which says that unless a copy of a last writing is

offered, no parol evidence will be permitted to prove the contends of the document. It also created a separate standard for application to cases involving the United States as a party which is without basis in the law.

C. Facts Relating to Government's Failure to Comply with Rule 4(j) and Election to be Bound by Bankruptcy Order.

(1) The Bankruptcy Order.

The Complaint was filed on May 30, 1984. Summons was issued the same date. The Summons was not served upon Petitioner until February 8, 1988, almost four years later. Service was effected by mailing a copy of the Summons and Complaint to Petitioner's attorneys (not a method otherwise conferring jurisdiction) pursuant to a

Settlement Agreement and Mutual Releases Regarding Procedural Issues and Order, which had been entered in a bankruptcy case to which Petitioner was a party. The bankruptcy Agreement and the Order entered pursuant thereto which creates that unusual method of service also prevents any creditor or party, including any party which fails to "opt out," from pursuing litigation against Petitioner, unless and until certain conditions are met. The Government did not "opt out," and the subject conditions were never met.

Petitioner contends that by electing to effect service pursuant to the bankruptcy Agreement and Order, the Government in fact "opted in."

The Government contends that the general rule which immunizes the Govern-

ment from suits aimed at restraining tax collection (26 U.S.C. §7421(a)) prevents application of the restraining order in this case, even though it elected to effect service of process pursuant to the terms of that order.

The Ninth Circuit approved the Government's position on the grounds that the Government "lacked any other alternative."

(2) F.R.C.P., Rule 4(j).

The Government never sought an extension of time in which to effect service before the 120-day time period set forth in F.R.C.P. Rule 4(j) expired.

In June of 1985, the Government had stated to the District Court that it would be required to bring an action in bankruptcy court to obtain relief from an automatic stay. The Government never

took such action. Petitioner was dismissed from the bankruptcy proceeding on April 16, 1986, pursuant to the Settlement Agreement, which allowed any non opt-out creditor to serve him by mail addressed to his attorneys. However, the Government failed to effect service in that manner for another two years, until February, 1988.

The only actions which the Government could demonstrate it took during the 120-day time period commencing upon issuance of the Summons on May 30, 1984, were that:

(i) on June 18, 1984, a Government agent went to a former address of Appellant and was informed by a caretaker for the bankruptcy trustee that Petitioner had moved to San Diego,

(ii) approximately two months

later, on August 10 and August 14, 1984, the Government telephoned the attorney for Appellant's then ex-wife. That person did not know Petitioner's whereabouts.

The Government argued that it made numerous efforts to locate Petitioner after the 120-day time period expired.

Petitioner moved to dismiss the Government's action for failure to comply with F.R.C.P. Rule 4(j), which motion was denied.

REASONS FOR GRANTING THE WRIT

A. Introduction.

The Petitioner taxpayer has been subjected to unwarranted delay and a series of decisions which have denied him simple fairness in the court system. He entered into a written agreement with the government, which was incorporated

into a stipulated Tax Order, requiring him to pay taxes and assessments (which did not include interest), and he paid them. The government knew that he believed no interest was owing. It waited six years to commence this suit, and four years to serve him, during which time the interest alleged was accruing. The government lost the agreement, but Petitioner was not allowed to present evidence as to its content. The government utilized a method of service only permitted because of a stipulated court order, but refuses to be bound by the other provisions of that order. And, finally, the government has evaded the mandatory provisions of a Federal Rule of Civil Procedure.

Apparently acting under an assump-

tion that the Government should be allowed unfettered leeway in pursuing and collecting federal revenue, the United States District Court, and the Ninth Circuit Court of Appeals, have overstepped the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and normal concepts of equity and jurisdiction to allow judgment to be entered against the Petitioner Jerome L. Doff. This activity extends even to allowing a summary judgment to be entered against Petitioner when the Petitioner offered uncontradicted evidence that he and the Government entered into a written Agreement liquidating the dispute existing between them and excluding the interest sought by the Government.

Although the decisions of the U.S.

District Court and the Court of Appeals are unpublished, they are so contrary to the accepted and usual course of judicial proceedings and demonstrate such a diversion from the plain meaning of the Rules in question, and the standards to be applied to motions for summary judgment, that consideration of this Petition and direction by this court to the lower court is warranted.

B. **The U.S. District Court and the Court of Appeals Stepped Outside the Permissible Limits with Respect to Standards Applied to the Granting of the Summary Judgment Motion.**

In considering a motion for summary judgment, evidence must be viewed in the light most favorable to the opposing party. A moving party must show

that there was no disputed issue of material fact. Mitsui Manufacturer's Bank vs. Federal Ins. Co. 795 F.2d 827, 829 (9th Cir. 1986). The decisions of the lower courts in this case in effect exempt the United States from these well-established rules.

Petitioner contended that he and the Government entered into a written Agreement providing for a liquidated sum of approximately $109,000 to be paid by Petitioner in total settlement of the dispute concerning his 1960 and 1961 taxes.

The existence of a written Agreement was undisputed. It was referenced in the stipulated Tax Court Order itself.

Prima facie evidence in support of Petitioner's position is the Tax Court

Order itself which, while specifically setting forth statutory additions required by 26 U.S.C. §6651 and 26 U.S.C. §6653, was completely silent about any statutory addition for interest pursuant to 26 U.S.C. §6601, upon which the Government based its claim. It was also supported by the evidence that when, eight months after the Tax Court Order was entered in 1978, the Government sent a letter requesting payment of additional amounts which included interest, and when Petitioner's attorney responded in November and December, 1978, by letter, pointing out that interest was not included in the settlement, the Government acquiesced and remained absolutely silent for six years, until filing its Complaint in 1984. (The Government of course then sought and obtained a

judgment for interest accruing during that entire six year delay.)

Petitioner placed into evidence in opposition to the motion for summary judgment both his declaration and the declaration of his attorney, who negotiated the settlement in 1978.

The Government offered no evidence on this issue!

Rule 1004, Federal Rules of Evidence, permits the introduction of secondary evidence of the contents of a writing if the original has been lost. In this case, the original was filed with the Government, who was unable to produce a copy. Neither side possessed copies after the inordinate ten year delay of the Government in commencing its case and serving Petitioner.

However, the trial court com-

pletely ignored the provisions of the Federal Rules of Evidence and took the position that, in the absence of the writing, the court could not consider the evidence offered by Petitioner as to the content of the writing.

The U.S. District Court thereby turned on its head the standard required in a motion for summary judgment. Petitioner clearly presented a triable issue of fact. The uncontradicted evidence presented by Petitioner was that there was a writing and that it did contain a waiver of interest by the Government.

The Ninth Circuit Court of Appeals attempts to finesse this problem, holding that the affidavit of Petitioner's attorney does not raise a triable issue of fact because it was "based on an overly broad reading of a provision that

waived liability for interest assessed between execution of the stipulation and the finality of the tax court's decision." Appendix A-9. The Ninth Circuit's reasoning is merely a tautological rationale. The Ninth Circuit cannot in logic make a finding that the attorney's affidavit constituted "an overbroad reading" of an agreement which the Ninth Circuit has never seen and with respect to which the Government offered no evidence as to its contents! The attorney in question, Mr. Knowles, is the only person who offered evidence who has seen the document. He negotiated it. Clearly, he is qualified to present evidence as to its contents, and no one is in a position at this stage to say that his "interpretation" is "overbroad."

Perhaps at trial a jury would find his evidence unconvincing and disbelieve him. However, the standard applicable to a motion for summary judgment is that the evidence must be viewed in the manner most favorable to the person opposing the motion for summary judgment. (And, perhaps at trial the jury would not only believe Mr. Knowles, but question the Government's decision not to offer the evidence of <u>their</u> attorney, who negotiated the written Agreement with Mr. Knowles.)

In their zeal to seek revenues and to punish a person the courts obviously believed was attempting to evade payment of taxes (see the original opening sentence of the Ninth Circuit's Opinion, Appendix A-2), the lower courts simply stepped outside the accepted norms of

judicial conduct. This behavior should not be sanctioned by the Supreme Court and Petitioner should be allowed his day in court, so that the evidence on this disputed issue may be presented to a trier of fact.

C. **When the Government Elects to Effect Service of Process Pursuant to an Agreement and Court Order, It Must be Bound by All of the Terms Thereof.**

The Government obtained jurisdiction over Petitioner in this case by mailing a copy of the Summons and Complaint to the Petitioner's attorneys. This is not a manner by which service may be obtained in the ordinary course of events, and the Government has never so argued. (Rule 4(d), Fed. Rules Civ. Proc.)

In this case, the Government admitted that it obtained service by the foregoing method pursuant to the terms of a settlement Agreement and Order entered in a Bankruptcy Court proceeding. The Agreement and Order provided that "Any creditor party in interest (except opt-out creditors) shall be entitled to serve Mr. Doff with any notice or motion or judicial process by mailing the same . . . to his attorney."

The Agreement and Order went on to provide that:

> "The plan shall operate as a restraining order, restraining and enjoining all creditors, except opt-out creditors, whether scheduled or filing claims in this case or in the consolidated case . . . and restrains and enjoins all parties in interest to this case, claimants and parties receiving benefits under the plan, except opt-out creditors, from suing, pursuing, enforcing or litigating any and all claims, causes of

> action or actions they may have against Mr. Jerome L. Doff, individually, until such time as the plan has not been fully performed according to its terms or until the case is converted or dismissed."

The Government's position was that 26 U.S.C. §7421(a) prohibits the use of a lawsuit to restrain collection or assessment of tax. However, in this case, the Government elected to be bound by the Order. It exercised this election by utilizing the terms of the settlement Agreement and Order for the purpose of effecting service of process in this case.

Clearly, the principles of equitable estoppel prevent any party from accepting the benefits of an agreement and Order while refusing to be bound by the obligations thereof. "Equitable estoppel prevents a party from assuming

inconsistent positions to the detriment of another party." United States v. Georgia-Pacific Company 421 F.2d 92, 96 (9th Cir. 1970).

The only reason that service of process in the manner chosen by the Government could be effective was because the bankruptcy Agreement and Order made it so. But the bankruptcy Agreement and Order makes such service effective only for creditors ("opt-in creditors") who are bound by the restraining orders. A creditor who did not want to be bound by the restraining orders (an "opt-out creditor") was and is free to pursue any litigation, but must abide by the normal rules relating to service of process.

The Ninth Circuit dealt with this jurisdictional problem with the conclu-

sory statement that "The Government had made every reasonable attempt to effect service and lacked any other alternative." The fact that the Government had no other alternative does not allow it to obtain service of process by an invalid means.

May the Government utilize "gutter service" simply because it has not been able to locate a defendant? The answer is clearly no. Similarly, the Government may not utilize the benefits of an agreement and Order which allows extraordinary means of service provided the party effecting service agrees to the existence of a restraining order, and then argue that it cannot be bound by the restraining order.

Petitioner agrees that the Government cannot normally be bound by a

restraining order when seeking to recover taxes.

But if it declines to be bound by the restraining order in question, it cannot accept the benefits of the order either. In essence, the Government is asserting the position that if it "lacks any other alternative," it may take advantage of any stipulated court order which a person has entered into, and enjoy the benefits of that order, while insisting that it is not a party to the stipulation and cannot be bound by any provision which does not confer a benefit to the governmental entity. The Government would exempt itself from the equitable rule that a party may not be allowed to take inconsistent positions to the detriment of another. This cannot be the law, and this court should

not allow either the Government or any lower court to operate under such a misapprehension.

D. **Federal Rule of Civil Procedure 4(j) is Mandatory and Cannot be Cured by Later Efforts.**

In this case, the Ninth Circuit, which has heretofore been in accord with its sister jurisdictions in interpreting Rule 4(j) according to its plain meaning, appears to be deviating from that position, allowing its mandatory provision to be evaded by a showing of diligent efforts made after the time period established by the Rule has expired. This issue appears never to have been addressed by the Supreme Court (and no need previously existed) as the various circuits which had considered it were in accord. However, because Rule

4(j) establishes a threshold procedural requirement in every case, the deviation signalled by the Ninth Circuit in this case should be corrected promptly by this Court.

As the Supreme Court stated with respect to Rule 15(c) in Schiavone v. Fortune 477 U.S. 21, 91 L.Ed. 2d 18, 106 S.Ct. 2379 (1986), "We do not have before us a choice between a 'liberal' approach toward [the Rule], on the one hand, and a 'technical' interpretation of the rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says." 477 U.S. at 30.

Federal Rule of Civil Procedure 4(j) provides that "If a service of the summons and complaint is not made upon a

defendant within 120 days after the filing of the complaint and the party on whose behalf such service is required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. . . ."

The cases are uniform that Rule 4(j) is to be strictly construed and that if a plaintiff fails to show good cause for delay, dismissal of the action is mandatory. Rule v. Nelson 106 F.R.D. 514, 517 (U.S.D.C. NEV. 1985); Shuster v. Connolly 107 F.R.D. 755, 757 (W.D.P.A. 1985). In Shuster v. Connolly, supra, it was stated that ". . . a court will not grant an extension where the plaintiff has not

demonstrated a reasonable effort to effect service prior to the running of the 120-day period." 107 F.R.D. at 757.

This approval has previously been followed by the Ninth Circuit as well. In U.S. v. Kenner General Contractor, Inc. 764 F.2d 707 (9th Cir. 1985) the Government attempted to obtain a retroactive application of Rule 6(b). However, it was unsuccessful, the Court of Appeals noting that Rule 6(b)(1) authorizes a court to extend the time limit only "if the Rule 4(j) 120 day period has not yet expired. 764 F.2d at 711, emphasis added.

In this case, the Ninth Circuit appears to be changing its interpretation of Rule 4(j) to permit "good cause" to be shown by efforts made after the mandatory 120 day period has expired.

In this case, the Government sought no extension of time prior to the running of the 120-day time period. The Government's attempts to serve, or even locate, Petitioner during the 120-day time period were virtually nonexistent and were certainly not calculated to locate him. The Government went to a house where Doff was known not to live (it was occupied by a bankruptcy court caretaker) and telephoned his ex-wife's attorney. The Government did not try to contact his then-current wife and the mother of his minor children in Los Angeles, it did not follow up on the bankruptcy caretaker's advice that Mr. Doff was then in San Diego, nor did it try to contact his two adult children or brother who lived in Los Angeles. It did not undertake the basic steps any

investigator would have undertaken to locate a defendant until long after the 120-day time limit had expired. (See Schuster, supra, for a list diligent search activities.) During the time in question Petitioner was residing in Palm Springs and any reasonably diligent search would have located him. The Government went into great detail with respect to efforts which it made to effect service after the 120-day time period had expired. Once again, the Ninth Circuit engaged in rationalization in dismissing this defect by simply stating that "Although the United States was unable to serve Doff for nearly four years, its effort to find him were reasonable."

Neither the District Court nor the Ninth Circuit came to grips with the

fact that, as a matter of law and logic, in light of the requirements of Federal Rule of Civil Procedure 4(j), all efforts of the Government after the 120-day time period had expired were irrelevant.

A plaintiff's proper course is to move for an extension of time prior to expiration of the 4(j) time period, pursuant to F.R.C.P. Rule 6, or at least to demonstrate that it acted diligently within the 120-day time period. Indeed, one reason why strict enforcement of Rule 4(j) has been held to not place an unduly harsh burden upon the plaintiff is that a plaintiff has a right to seek enlargement of the 120-day time period prior to its expiration pursuant to Rule 6(b).

The strict interpretation of the

120-day time limit and a plaintiff's duty to either effect service or request an extension before expiration of the 120-day time period is set forth in the case of Excalibur Oil, Inc. vs. Gable 105 F.R.D. 543 (N.D. ILL. 1985).

". . . Rule 4(j)'s 120-day watershed establishes not some kind of norm, but rather an outside not-to-be-exceeded date, akin to a statute of limitations." 105 F.R.D. at 544, emphasis original.

The Government should not be held to a lesser standard than any other plaintiff in terms of the requirement that it comply with the Federal Rules of Civil Procedure.

/ / /

/ / /

/ / /

E. The Excessive Delay in this Case Is Violative of the Concept of Fair Treatment and the Eighth Amendment.

The Eighth Amendment of the United States Constitution prohibits excessive fines and cruel and unusual punishment. At the very least, the concepts of equal protection and due process require that all litigants be treated reasonably and fairly.

This case involves a tax dispute that arose 31 years ago. In 1978, the parties believed they had settled all issues, and Petitioner elected not to pursue his remedies in court, but to pay a liquidated sum of approximately $109,000 to resolve his dispute with the government pursuant to a written agreement. Eight months later, the

government sent him a bill for additional sums, and his attorney told the government in no uncertain terms that was not the agreement. The government then lay silently in wait for six years (all the while computing interest) until filing its Complaint. It then took four years to effect service in 1988, a total of 10 years. (Litigation from the date of service to entry of summary judgment and completion of briefing on appeal to the 9th circuit was prompt - the Reply Brief being filed in January 1990.) The Ninth Circuit then took over two years to consider the matter.

Petitioner submits that <u>even if</u> each separate delay could be somehow justified, the cumulative effect, including a 10 year delay during which

he did not know that a dispute existed, but during which the one crucial piece of evidence was lost by both parties (including the Government which presumably knew it was going to file its lawsuit) and the Tax Court, and during which interest continued to accumulate to a sum over twice the amount of the liquidated settlement sum, constitutes a basic denial of fair and equitable treatment amounting to cruel and unusual punishment against a taxpayer who acted in good faith pursuant to what he believed was a final settlement.

///

///

///

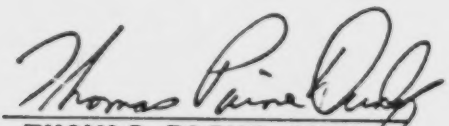
CONCLUSION

For the reasons set forth above, this petition of certiorari should be granted.

Dated: November 24, 1992.

Respectfully submitted,

TROPE AND TROPE

By: 

THOMAS PAINE DUNLAP
Attorneys for Petitioner

APPENDIX A

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEROME L. DOFF, Defendant-Appellant.	No. 89-55324 D.C. NO. CV-84-4018-WJR MEMORANDUM* [FILED 8/3/92]

Appeal from the United States District Court for the District of Central California

William J. Rea, District Judge, Presiding

Submitted** July 27, 1992
Seattle, Washington

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed.R. App. P. 34(a); Ninth Circuit Rule 34-4.

Before: WRIGHT, FARRIS and BEEZER, Circuit Judges.

[Per Order of 9/4/92] In 1960 and 1960, ~~Jerome Doff failed to pay federal income taxes~~ [the United States disallowed some of Jerome Doff's tax deductions.] The United States subsequently sought payment of those taxes plus interest and penalties. In 1978, the tax court entered a decision pursuant to a written stipulation between Doff and the government. He then paid approximately $109,000 in taxes, but nothing in interest. In 1984, the government filed a complaint against Doff to reduce his tax assessments to judgment under 26 U.S.C. § 7401. The government alleged that he still owed $216,411.37 in interest.

Because the government failed to

effect service until 1988, Doff moved initially to dismiss the suit for insufficiency of service of process. Under Fed. R. Civ. P. 4 (j), an action must be dismissed if service is not effected within 120 days of filling the complaint unless the party required to effect service can show good cause. Although nearly 4 years passed between the time that the complaint was filed and served, the district court found good cause for the government's delay, and denied Doff's motion to dismiss.

Doff raised two major affirmative defenses in his answer. He argued that the government was estopped from taxing him because the stipulated judgment waived his interest liability. He also contended that the government was estopped from litigating any claims

against him by a settlement agreement in his bankruptcy suit that barred all creditors, including the government, from suing him.

The district court rejected both arguments and granted summary judgment for the United States. Doff appeals that judgment and the denial of his motion to dismiss.

I

A. Stipulated Tax Court Judgment.

"The Government is not immune from equitable estoppel." United States v. Ruby, 588 F.2d 697, 702-03 (9th Cir. 1978). To prove estoppel, an appellant must show that a party "made a knowing false representation or concealment of material facts to a party ignorant of the facts, with the intention that the other party should rely on it, where the

other party actually and detrimentally relies on it." Mukherjee v. INS, 793 F.2d 1006, 1008 (9th Cir. 1986). Yet "the Government may not be estopped on the same terms as any other litigant." Heckler v. Community Health Services of Crawford County, Inc. 467 U.S. 51, 60 (1984). To estop the government, a party must prove the traditional elements of estoppel plus affirmative misconduct. Jaa v. INS, 779 F.2d 569, 572 (9th Cir. 1986).

Doff fails to establish a genuine issue of material fact as to two essential elements of estoppel. Although he claims to have relied on an agreement waiving his interest liability, he is unable to produce any agreement or any evidence of the substance of that agreement, nor can he show that his reliance

was reasonable.

Doff argues that the district court erred in granting summary judgment because the substance of his agreement with the United States regarding his tax liability is disputed. He offers as evidence a personal affidavit, his attorney's affidavit, and the 1978 tax court decision. Yet all three fail to establish a genuine issue of material fact sufficient to preclude summary judgment.

Doff's personal affidavit says merely that he was "led to believe by the Internal Revenue Service that [the stipulation] was a total settlement and that the Government would not and could not pursue interest or penalties which may have accrued prior to the date of settlement." The affidavit refers to

his attorney's affidavit regarding the details of the negotiation.

The attorney's affidavit similarly fails to shed any light on the substance of the stipulation. He says he believed Doff would not owe any interest based on a telephone conversation with the government's attorney. He also refers to his written notes from that telephone conversation. Finally, he describes his interpretation of the stipulation:

> This stipulated judgment contained the amounts agreed upon, in addition to language whereby Mr. Doff waived restrictions as to assessment of interest during the period between the execution of the stipulation and the finality of the decision of the tax court. This provision suggested to me

> that the stipulated judgment comported with my understanding of our negotiated settlement . . .

The tax court decision notes that the court received a decision document signed by Doff's attorney and the IRS commissioner as a stipulation. Unfortunately, the decision is silent as to the substance of that agreement.

"Persons dealing with the government are charged with knowing government statutes and regulations." Mukherjee, 793 F.2d at 1009 (quoting Lavin v. Marsh, 644 F.2d 1378, 1383 (9th Cir. 1981)). All compromise agreements that discharge tax liability must conform with procedures established in 26 U.S.C. § 7122. Compromise agreements must be in writing. Treas. Reg. § 301.7122-1(d)(3) (1991). Informal agreements are

not binding under the tax laws. Shumaker v. Commissioner, 648 F.2d 1198, 1200 (9th Cir. 1981). Doff's reliance is not reasonable for two reasons. First, he believes that his interest liability had been waived based on his attorney's telephone conversations. Second, his attorney believes that his client's interest liability had been waived based on an overly broad reading of a provision that waived liability for interest assessed between the execution of the stipulation and the finality of the tax court's decision. Reliance of this sort would not give rise to an estoppel claim against either a private party or the government. Heckler, 467 U.S. at 65-66.

Doff also fails to show affirmative misconduct by the government. "An

affirmative misrepresentation or affirmative concealment of a material fact" is necessary to prove affirmative misconduct. Ruby, 588 F.2d at 703-04. Negligence does not rise to the level of misconduct required for estoppel. Mukherjee, 793 F.2d at 1009. Because Doff does not present any evidence suggesting negligence, much less misrepresentation or concealment by the government, we find no affirmative misconduct.

B. Settlement Agreement in Doff's Bankruptcy Case.

Doff also contended that the United States was barred from suing him because a settlement agreement in his bankruptcy case enjoined all creditors from pursing claims. Yet 26 U.S.C. § 7421(a) prohibits use of a lawsuit to restrain collection or assessment of

tax. In re Condel, 91 B.R. 79, 82 (Bankr. 9th Cir. 1988). He counters that the United States is bound by the bankruptcy settlement agreement because the government "opted-in" by using the addresses in the agreement to serve him. We are not persuaded. The government had made every reasonable attempt to effect service and lacked any other alternative.

II

Doff also appeals the district court's order denying his motion to dismiss pursuant to Fed. R. Civ. P. 4(j). Rule 4(j) requires a district court to dismiss a complaint if service is not made within 120 days of filing the complaint. The deadline is intended to prevent "inadvertent or needless non-service." Shuster v. Conley 107 F.R.D.

755, 757 (W.D. Pa. 1985). Where a party has made reasonable efforts to effect service and establishes good cause for failing to meet the deadline, the court may grant an extension. United States v. Kenner General Contractor, Inc. 764 F.2d 707, 711 (9th Cir. 1985).

An obvious example of good cause is a defendant's evasion of service. Wei v. Hawaii, 763 F.2d 370, 371 (9th Cir. 1985). As noted in the district court's order, the evidence indicates that Doff was an "exceedingly difficult person to track down." Even his own lawyers had no way to contact him. The evidence supports the district court's finding that the United States exercised reasonable diligence in its efforts to locate Doff. Although the United States was unable to serve Doff for nearly four

years, its efforts to find him were reasonable.

AFFIRMED.

APPENDIX B

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEROME L. DOFF, Defendant-Appellant.	No. 89-55324 D.C. NO. CV-84-4018-WJR ORDER [FILED 10/14/92]

Before: WRIGHT, FARRIS and BEEZER, Circuit Judges.

The Memorandum disposition filed on August 3, 1992 is amended as follows:

The first sentence of the disposition shall be changed to read: "In 1960 and 1961, the United States disallowed some of Jerome Doff's tax deductions."

The appellant's Petition for Rehearing, filed on August 17, 1992, has been considered and is **DENIED.**

APPENDIX C

APPENDIX C

ROBERT C. BONNER
United States Attorney
CHARLES H. MAGNUSON
Assistant United States Attorney
Chief, Tax Division
EDWARD M. ROBBINS, JR.
Assistant United States Attorney
300 North Los Angeles Street, Room 2315
Los Angeles, California 90012
Tele. (213) 894-2729 -6550

Attorneys for United States of America

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	CV 84-4018-WJR(Bx)
Plaintiff,	ORDER DENYING DEFENDNT JEROME L. DOFF'S MOTION TO DISMISS
v.	
JEROME L. DOFF and MILDRED C. DOFF,	[ENTERED-CLERK, U.S. DISTRICT CT. MAY 12, 1988]
Defendants.	

The above case came on for hearing before the Honorable William J. Rea,

United States District Judge, on April 25, 1988, upon the defendant's motion to dismiss.

Thomas Paine Dunlap appeared for the defendant, Jerome L. Doff. Edward Mr. [sic] Robbins, Jr., Assistant United States Attorney, appeared for the plaintiff, United States of America.

The Court has carefully considered the papers filed by the parties, the oral arguments of counsel and the entire record herein, GOOD CAUSE APPEARING THEREFOR, the Court denies defendant's motion to dismiss for failure to comply with Fed. R. Civ. P. 4(j). Extensions of time in which to serve the complaint and summons may be granted under Fed. R. Civ. P. 4(j) upon a showing of GOOD CAUSE. Plaintiff exercised reasonable diligence in attempting to located Mr.

Doff, who the evidence indicates was an exceedingly difficult person to track down. With respect to the period during which Mr. Doff was in bankruptcy, the Court declines to impose a requirement that plaintiff move to lift the stay solely for purposes of perfecting process. The purpose of Rule 4(j) is "to encourage prompt movement of civil actions in the federal courts." H.R. 7154, 97th Cong., 2d Sess., 128 Cong. Rec. H 9848, reprinted in 1982 U.S. Code Cong. & Ad. News 4434, 4442. This purpose is not furthered by requiring the initiation of an adversary action to effect process where the automatic stay would in any event have blocked further proceedings.

Defendant, Jerome L. Doff, shall have thirty (30) days from the date of

entry of this Order to answer the complaint.

DATED: May 9, 1988

WILLIAM J. REA
United States
District Judge

APPENDIX D

APPENDIX "D"

ROBERT C. BONNER
United States Attorney
MASON C. LEWIS
Assistant United States Attorney
Chief, Tax Division
EDWARD M. ROBBINS, JR.
Assistant United States Attorney
300 North Los Angeles Street, Room 2315
Los Angeles, California 90012
Tel. (213) 894-2729 -6550

Attorneys for United States of America

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	CV 84-4018-WJR(Bx)
Plaintiff,	SUMMARY JUDGMENT FOR THE UNITED
v.	STATES OF AMERICA AGAINST JEROME L.
JEROME L. DOFF and MILDRED C. DOFF,	DOFF
Defendants.	[Entered January 20, 1989]

In accordance with this Court's Statement of Uncontroverted Facts and Conclusions of Law, IT IS ORDERED AND

ADJUDGED that the plaintiff, United States of America, recover from the defendant Jerome L. Doff, the sum of $216,411.37 (including interest computed through December 31, 1988), as set forth on the Liability Statement, attached hereto, together with additional interest accruing after December 31, 1988, as provided by law.

DATED:

WILLIAM J. REA
United States
District Judge